

LITIGATING THE APPOINTMENTS CLAUSE: THE MOST EFFECTIVE SOLUTION FOR SENATE OBSTRUCTION OF THE JUDICIAL CONFIRMATION PROCESS

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I. INTRODUCTION

Peter Keisler was nominated to the Court of Appeals for the District of Columbia Circuit by President George W. Bush three times; each time his nomination expired and was returned to the President without the Senate voting whether to confirm his nomination.¹ Keisler's final nomination expired and was returned to the President when the 110th Congress session ended on January 4, 2009, 920 days after he was first nominated on June 29, 2006. After two and a half years of political bickering and excuses, the Senate never voted to confirm or reject Keisler's nomination.² In essence, the Yale Law graduate, former Supreme Court law clerk, and former Acting Attorney General of the United States, who was given the American Bar Association's highest judicial nominee rating of "well qualified," put his professional life on hold for two and a half years only to end up caught in the middle of a political warzone.³

The increased partisanship and obstruction at the hands of both Democrats and Republicans involved in the Senate confirmation process for federal judges has been the subject of much scholarly discussion and criticism. Indeed, the confirmation process has been

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1 See The White House, Judicial Nominations, Peter Keisler, <http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/keisler.html>.

2 Although the Senate Judiciary Committee held a hearing on Keisler's nomination on August 1, 2006, soon after he was nominated, it never took any further action because of the timing of the 2006 Congressional elections. See Yale Law School Lillian Goldman Law Library, Judicial Nominations, Peter D. Keisler, <http://judges.law.yale.edu/?q=node/3253> (last visited Feb. 16, 2010).

3 See *id.*; see also Quin Hillyer, Commentary, *Judge Knot Still Holds*, EXAMINER.COM, Mar. 14, 2008, http://www.examiner.com/a-1278077~Quin_Hillyer_Judge_knot_still_holds.html.

criticized by the President of the United States,⁴ Supreme Court Justices,⁵ both Republican and Democratic senators,⁶ legal scholars,⁷ the American Bar Association,⁸ and the media.⁹ Despite the furor over what has been repeatedly called a “broken judicial confirmation process,”¹⁰ the Senate has not made any changes to address the confirmation process problems, nor is any internal action to fix the problem foreseeable.¹¹

Worsening over the past few decades, the judicial confirmation process is highly flawed and, at times, unconstitutional. Although the ideal solution would involve bipartisan cooperation within the Senate, or a bipartisan agreement between the Senate and the President, neither of these solutions is likely for a variety of political reasons. Thus, although not the ideal venue to address the Senate’s issues, action by the third branch of government, the Judiciary, provides the most effective solution to the unconstitutional aspects of the confirmation problem.¹²

⁴ See President George W. Bush, Discussion on Judicial Accomplishments and Philosophy in Cincinnati, Ohio (Oct. 6, 2008) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081006-5.html>).

⁵ See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 186–87 (2003) (discussing the problems with the current confirmation process, particularly with the use of filibusters to block votes on nominees, and noting that Chief Justice William Rehnquist repeatedly urged “speedier consideration of judicial nominees by the United States Senate”).

⁶ See Senator Patrick Leahy, Statement on Judicial Nominations (Mar. 3, 2008), available at <http://leahy.senate.gov/press/200803/030308b.html> (urging President Bush to overcome partisanship and make judicial nominees acceptable to their home-state senators); see also Arlen Specter, *Justice Delayed*, WALL ST. J., Feb. 1, 2008, at A14 (calling for a truce “in the partisan grudge match” over the confirmation process for judicial nominees).

⁷ See, e.g., Cornyn, *supra* note 5, at 186–87; E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL’Y. 341, 345 (2006) (surveying the Senate’s treatment of lower-court judicial nominees and identifying “confirmation process fallacies” used by senators for political gain).

⁸ See Edward A. Adams, *ABA Proposes Bipartisan Judicial Selection Process*, A.B.A. J., Aug. 11, 2008, http://abajournal.com/news/aba_proposes_bipartisan_judicial_selection_process.

⁹ See, e.g., Cornyn, *supra* note 5, at 184; Hillyer, *supra* note 3; Editorial, *Courting Common Sense: Will the White House and Congress Find a Better Way to Nominate and Confirm Judges?*, WASH. POST, Jan. 21, 2009, at A10. However, the extent of this problem has mainly gone unnoticed by the mainstream media over the past few years.

¹⁰ See, e.g., Cornyn, *supra* note 5, at 183.

¹¹ Some of the complex political reasons why the Senate is unlikely to take action on its own to “emasculate itself” are discussed in BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 113–16 (2006). For further discussion see *infra* Part II.D.

¹² The possibility of, and potential issues with, a judicial resolution are discussed by Lee Renzin, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739 (1998). This Comment will address some of Renzin’s arguments and update

In theory, a lawsuit brought against the U.S. Senate by the proper plaintiff would allow the judicial branch to resolve this conflict between the executive and legislative branches. A judicial decree that the current Senate confirmation process, which allows partisan obstruction, is unconstitutional would be the first step to ensure that the confirmation problems are addressed by the Senate. This Comment will examine the advantages, obstacles, and potential problems with a judicial resolution. It will focus on the specific problem of the Senate Judiciary Committee delaying and refusing to schedule hearings for court of appeals judgeship nominees and, less frequently, district court nominees. The Comment will also discuss whether a judicial remedy could address this serious issue without overstepping its constitutional limits and why such remedy may be necessary.

II. BACKGROUND

A. *The Advice and Consent Clause of the Constitution*

The Appointments Clause of the U.S. Constitution states that the President “by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”¹³ The decision to have the President appoint judges and the Senate give “advice and consent” was reached after much debate at the Constitutional Convention.¹⁴ Furthermore, because the precise constitutional meaning of “advice and consent” is unclear,¹⁵ the executive and legislative branches have battled for power in the judicial appointments process. This battle over the process has escalated dramatically over the past twenty-five years.¹⁶

recent legal developments, while also providing a new perspective as to why a judicial resolution may be a necessary solution to the judicial confirmation problem.

¹³ U.S. CONST. art. II, § 2, cl. 2.

¹⁴ The appointments process was heavily debated by the Framers of the Constitution. See Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL'Y 103 (2005). Alexander Hamilton, in the *Federalist Papers*, argued that the Senate should only ratify or reject a nominee, not take part in choosing a nominee. *Id.* at 127. Conversely, James Madison, among others, argued that the entire appointment process should go through the Senate. *Id.* at 112.

¹⁵ See generally White, *supra* note 14.

¹⁶ For a detailed discussion of the historical development of the politicization of the judicial appointments process, see WITTES, *supra* note 11, at 37–85. Wittes argues that the judicial confirmation process changed during the Reagan Administration, and that the “ability of presidents to win confirmation for their judicial nominees has eroded steadily since the mid-1980s.” *Id.* at 41.

B. Overview of the Senate Judiciary Confirmation Process

Presently, the judicial appointment process begins with the President nominating an individual for a vacant judgeship, which the Senate refers to the Senate Judiciary Committee ("SJC"). In theory, the SJC vets judicial nominees by holding hearings and voting on how to report a nomination to the full Senate. The Senate then debates and votes on the nominee; this debate may be subject to filibuster.¹⁷

Although normally a nominee is voted on by the SJC and then either confirmed or rejected by the Senate, there are a few ways in which the Senate can, often for political reasons, avoid officially taking action on a nominee: the SJC chairman can indefinitely withhold scheduling a SJC hearing or vote for a nominee, or a Senator can filibuster (endlessly prolonging the debate) when the nominee goes to the full Senate for a vote.¹⁸ The former most commonly occurs when the President is of one political party and the Senate is controlled by the other party,¹⁹ and the latter usually occurs when the Senate minority *strongly* opposes the President's nominee.²⁰ Not surprisingly, Senate obstruction occurs most frequently during a President's final year in office, especially the final year of a second term.²¹

Senate rules and the SJC's Rules of Procedure establish the process of confirming a judicial nominee. Senate Rule XXXI (1) states that when the President makes a nomination, "unless otherwise ordered, [the nomination shall] be referred to the appropriate committees; and the final question on every nomination shall be, 'Will

¹⁷ People for the Am. Way, *The Judicial Confirmation Process: A Step-by-Step Guide*, <http://media.pfaw.org/JudicialConfirmationProcess.pdf>.

¹⁸ See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 89–100 (2005).

¹⁹ See John R. Lott, Jr., *The Judicial Confirmation Process: The Difficulty with Being Smart*, 2 J. EMPIRICAL LEGAL STUD. 407, 427–29 (2005). Lott's statistical analysis suggests that the single most important factor in determining if a nominee will be confirmed and the length of time for the confirmation is whether or not the Senate and President are of the same party. *Id.* at 424.

²⁰ The use of the filibuster to block a judicial nominee raises separate constitutional concerns and is discussed *infra* at note 37 and accompanying text.

²¹ See Lott, *supra* note 19, at 427, 443. During the eighth and final year of a presidential term, the Senate majority or minority (whichever is controlled by the opposite political party than the President's) knows that there is a chance their party will take control of the executive office in the next presidential election and that future judicial nominees will be more favorable to their party. Additionally, an informal and controversial senatorial practice in which judicial nominees will not be voted on after July 1st of an election year, called the "Thurmond Rule," decreases the number of confirmations in an election year. See Geoff Earle, *Senators Spar over "Thurmond Rule"*, HILL, July 21, 2004, at 4. However, while often invoked in discussions on the confirmation practice, it is unclear how strictly the rule is followed. *Id.*

the Senate advise and consent to this nomination?”²² Further, Rule XXXI (6) states that nominations that are “neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President.”²³ Meanwhile, the Rules of Procedure for the SJC state that “[m]eetings of the Committee may be called by the Chairman as he may deem necessary on three days’ notice of the date, time, place and subject matter of the meeting, or in the alternative with the consent of the Ranking Minority Member.”²⁴ Thus, the President’s judicial nomination goes directly to the SJC, and the SJC Chairman decides when to hold hearings regarding that nominee.

Before the SJC holds a hearing on a nominee, there is an informal senatorial requirement that the nominee’s home state senators approve the nominee, which is known as “blue slipping.”²⁵ While the SJC hearings and Senate vote appear to constitute the “consent,” the blue slip process appears to be an attempt to address the “advice” component of “advice and consent.”²⁶

Although the formal procedure is the same for every nominee, regardless of the level of the court she is nominated to, the reality of the confirmation process is that the level of the court matters a great deal.²⁷ At the highest level, Supreme Court nominees are intensely scrutinized politically (though not subject to the blue slip process), and thus have lengthy and intense SJC hearings.²⁸ However, because

22 S. COMM. ON RULES & ADMIN., *STANDING RULES OF THE SENATE*, Rule XXXI, *available at* <http://www.rules.senate.gov/> (follow “Rules of the Senate” hyperlink; then follow “Executive Session—Proceedings on Nominations” hyperlink).

23 *Id.*

24 153 CONG. REC. S1184 (Jan. 25, 2007); *see also* RULES OF PROCEDURE U.S. SENATE COMM. ON THE JUDICIARY, *available at* <http://judiciary.senate.gov/about/committee-rules.cfm>.

25 *See* Brannon P. Denning, *The ‘Blue Slip’: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001). The term “blue slip” refers to the process in which the SJC chair sends a blue slip of paper to the home state senator of the nominee, who must return the slip for the nominee to get a hearing. *Id.* at 76. If a senator does not return the blue slip, the nomination is “dead in the water, or further action will be extremely difficult, depending on which practice the committee chair decides to follow.” *Id.* The blue slip process is the result of “senatorial courtesy,” where the President is expected to consult with the home state senators prior to making the judicial nomination. *Id.* at 76 n.3.

26 *See* EPSTEIN & SEGAL, *supra* note 18, at 77–79. Recently, SJC Chair Patrick Leahy stated that “[r]equiring the support of home state Senators is a traditional mechanism to encourage the White House to engage in meaningful consultation with the Senate.” Leahy, *supra* note 6. Indeed, Senator Leahy further stated that the reason why nominees were withdrawn, or had not been considered for a number of months, was because they lacked the support of a home state senator. *Id.*

27 *See* Lott, *supra* note 19, at 427.

28 *See* EPSTEIN & SEGAL, *supra* note 18, at 95–98.

of a number of factors, including intense media interest and visibility, the infrequency of vacancies, the influence of interest groups, and the low number of total Supreme Court Justices, the confirmation process is quite different for Supreme Court nominees than it is for district and circuit court nominees. Indeed, the public scrutiny on a Supreme Court nomination and confirmation keeps the partisan system working smoothly by forcing the Senate to take action on nominees.²⁹

While the Supreme Court nominee confirmation process is highly public, the more frequent district and circuit court nominee confirmation process mostly remains out of the public eye.³⁰ Perhaps as a result, the duration of the average lower court confirmation process has slowed dramatically since Jimmy Carter's presidency, and the number of nominees who have not been confirmed by the Senate has increased since George H.W. Bush was in office.³¹

Circuit court and district court nominees should not be lumped together as there is a significant difference in the Senate's treatment of each.³² Overall, circuit court nominees have much longer delays and are more likely *not* to be confirmed than district court nominees.³³ The reason for this discrepancy most likely relates to the difference in political importance between the courts: circuit court nominees garner much more interest from political activists than district court nominees.³⁴ This difference allows senators, who are con-

29 When one political party does not control both the executive and the legislative branches, the Supreme Court nomination and confirmation process is usually a highly contentious partisan battle, which is further amplified by heavy media coverage. *See id.* at 96. At the same time, even less contentious Supreme Court nominee confirmation hearings receive intense media coverage, and thus there is constant public scrutiny of the confirmation process which prevents the use of obstruction tactics. *Id.* at 96–97.

30 While the mainstream media does not usually report on the lower federal court confirmation disputes, there are occasional articles and editorials about the process. *See, e.g.*, Editorial, *supra* note 9; Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sept. 5, 2003, at A1. Additionally, Internet sites, such as www.confirmthem.com keep a close watch on the process.

31 *See* Lott, *supra* note 19, at 415–16; *see also* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 2–3 (2005). Scherer argues that the Senate obstructionism in the confirmation process has been mainly caused by the increased politicization, or as she calls it, “elite mobilization,” partly due to the rise of political interest groups. *Id.* at 5–6, 132–33.

32 *See* Lott, *supra* note 19, at 445; *see also* SCHERER, *supra* note 31, at 139–40.

33 *See* Lott, *supra* note 19, at 428, 440.

34 *See* SCHERER, *supra* note 31, at 122–32. Both liberal and conservative interest groups attack or defend nominees depending on whether or not the nominee was nominated by a President of their affiliated party. *Id.* at 122–23. However, the groups lack the resources to challenge every nomination, and thus focus their attention on circuit court nominees. *Id.* at 123.

cerned about appealing to their supporters, to fight more “controversial” circuit court nominees, while confirming district court nominees in an effort to boost overall presidential nominee confirmation rates.³⁵ Through such confirmation rate gymnastics, senators who have stalled SJC hearings on nominations can boast of productive confirmations, ignoring that a high percentage of circuit court nominees never even had a SJC hearing or vote.

Overall, as the judicial confirmation process has become more politicized, it has become highly contentious and slowed down dramatically. This has had an immediate effect on the number of vacancies in the lower federal courts, especially in certain circuit courts.³⁶ Additionally, there is a less direct effect on the quality of the judiciary: because the confirmation process puts a nominee’s career into uncertain limbo for an indefinite period of time without any assurance of confirmation, there is good reason for highly qualified potential nominees to turn down a judicial nomination. In the end, an increase in judicial vacancies will lead to a more crowded court system and a longer judicial process for litigants.

³⁵ District and circuit court confirmation statistics are often cited together by senators who want to promote the positives of nominee confirmations, which leads to misleading statistics about the length of time between a nomination and confirmation, and the overall number of nominees who are confirmed. See Lott, *supra* note 19, at 409–10. The misuse of confirmation statistics for political purposes was examined in detail by E. Stewart Moritz in “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*. See Moritz, *supra* note 7, at 365–92. In a more recent example of such statistical gymnastics, Senator Leahy conflated statistics when responding to criticism about the slow confirmation process during 2008, President Bush’s final year in office. See Leahy, *supra* note 6 (claiming to have “confirmed over 86 percent of President Bush’s judicial nominations” and “nearly three quarters” of President Bush’s circuit court nominations). Yet, looking at the final numbers for the 110th Congress, out of the sixty-eight total nominees that were confirmed, only ten were circuit court nominees, leaving another ten circuit court nominations pending (six of which were pending for over a year)—a 50% confirmation rate. See JUDICIAL CONFIRMATIONS—110TH CONGRESS: DEC. 1, 2008 (2008), available at <http://www.uscourts.gov/vacancies/archives/200812/confirmations.pdf>. In contrast, the 110th Congress confirmed fifty-eight district court nominees, leaving only sixteen nominations pending—a 78% confirmation rate. See *id.*; VACANCIES IN THE FEDERAL JUDICIARY—110TH CONGRESS: DEC. 1, 2008 (2008), available at http://www.uscourts.gov/vacancies/archives/200812/current_vacancy_list.pdf.

³⁶ At the start of 2009, there were thirteen vacancies out of 179 Court of Appeals judgeships, and forty-one vacancies out of 678 District Court judgeships. VACANCIES IN THE FEDERAL JUDICIARY—110TH CONGRESS: JAN. 1, 2009 (2009), available at http://www.uscourts.gov/vacancies/archives/200901/current_vacancy_list.pdf. Further, overall in the lower federal courts, there were eighteen “judicial emergencies,” defined as having a vacancy for over eighteen months. JUDICIAL EMERGENCIES—110TH CONGRESS: JAN. 1, 2009 (2009), available at <http://www.uscourts.gov/vacancies/archives/200901/emergencies.pdf>.

*C. Issues with the Confirmation Process: The Senate's Obstructionism
Interferes with Judicial Appointments*

As previously noted, there are two main ways in which the Senate can obstruct the confirmation process: through the use of the filibuster after the nomination process leaves the SJC, or, more commonly but less publicized, by the SJC never taking action on a nomination. Both methods of obstruction have similar results: they prevent the full Senate from confirming or rejecting a nomination. Both methods are indirect tactics that take advantage of Senate procedural loopholes, and, at best, each seems to stretch the Senate's power to give advice and consent. While both forms of obstruction may be unconstitutional, this Comment will only briefly discuss the issues with filibusters, and then focus on SJC inaction, arguing that such conduct is both unconstitutional and potentially subject to adjudication.

The filibuster, a tactic that is only available in the Senate, allows one senator to debate endlessly, thus preventing the full Senate from voting on a nominee; Senate Rules require that sixty senators vote to end the unilateral debate.³⁷ This obstruction technique is used almost exclusively when the President and the Senate majority belong to the same party, as it allows the Senate minority to potentially block a nominee (and is usually reserved for the most controversial nominees).³⁸

Whether or not the use of the filibuster as a judicial nomination blocker is constitutional is a divisive issue. On one hand, the Advice and Consent Clause does not require any specific action by the Senate regarding a nominee, and it does not specify whether or not a majority or supermajority is required to "consent" for confirmation.³⁹ Conversely, many scholars argue that requiring a supermajority to defeat a filibuster "effectively reorder[s] the Constitution's allocation of

³⁷ Thus, a filibuster requires a "super-majority" of senators to end the debate, which is known as invoking a cloture motion. SCHERER, *supra* note 31, at 147. The use of filibusters to block judicial nominations started in 1968 to block a Lyndon Johnson Supreme Court nominee, Abraham Fortas. *Id.* at 148. It was not until Ronald Reagan's presidency that filibusters were used to block lower court nominees. *Id.* The controversy over the use of filibusters to block Senate confirmation votes seemed to reach its pinnacle during George W. Bush's first term in office when the Senate of the 108th Congress blocked ten circuit court nominees. *Id.* at 151; *see also* Cornyn, *supra* note 5, at 191–93.

³⁸ However, during the Clinton Administration, Democrats (Clinton's own party) filibustered a conservative nominee President Clinton had agreed to nominate as part of a bipartisan compromise. *See* SCHERER, *supra* note 31, at 149.

³⁹ *See generally* White, *supra* note 14.

executive power with respect to appointments” by increasing the power of the Senate over the appointment process.⁴⁰

The other obstruction method used to block Senate confirmation of a nominee is a SJC nomination freeze; that is, the SJC simply refuses to take action regarding a nominee, as it did with Peter Keisler’s nomination.⁴¹ This usually happens two ways: by utilizing the “blue slip” requirement⁴² or simply never scheduling a SJC vote.⁴³ Freezing the confirmation process in the SJC is a by-product of the SJC rules, which allow the SJC chair to unilaterally determine hearing schedules and schedule committee votes on nominations.⁴⁴ Because there is no time limit on when (or whether) the SJC has to act on a nomination, the SJC chair can simply refuse to schedule a vote until that Senate session is adjourned.⁴⁵

There has been less debate over whether or not the SJC chair freezing the confirmation process is constitutional than there has

40 Cornyn, *supra* note 5, at 201. Further, the Constitution does specifically require a two-thirds majority for certain matters, as opposed to only a simple majority for most matters. *Id.* at 202.

41 See Senator Arlen Specter, Speech on the Senate Floor Regarding Judicial Nominations (Mar. 3, 2008) (transcript available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=7a7fe355-aa35-f429-f3d8-a599d046c92b&Region_id=&Issue_id=). As Senator Specter noted, the problem of not scheduling a hearing or SJC vote most frequently occurs when the Senate and President are controlled by different parties. *Id.*

42 Using this method requires that at least one of the senators from the nominee’s “home state”—the state in which the nominee would be a judge—be politically aligned with the SJC chair and “opposed” to the nomination. Although the blue slip policy is informal and somewhat controversial, it has been directly cited as a reason for delaying a nominee’s hearing and vote. See Leahy, *supra* note 6.

43 Although both methods require the SJC chair to refuse to schedule a hearing or vote, if neither home state senator opposes the nominee, or if there is no home state senator (for example, if the nomination is for the District of Columbia Circuit or District Court), then the chair cannot use the blue slip as an excuse for the freeze.

44 The SJC chair alone controls the committee schedule, and thus wields enormous power over the judicial confirmation process. See 153 CONG. REC. S1184 (2007); see also discussion *supra* note 24 and accompanying text. Because there is no set procedure for forcing the SJC to hold a confirmation hearing, frustrated senators have used other tactics, such as threats to hold up future legislation, as ways to put pressure on the chair to take action. See Keith Perine & Seth Stern, *Senate Tiff over Judges Gets Personal*, CONG. Q. TODAY, Apr. 10, 2008, available at <http://www.cqpolitics.com/wmspage.cfm?parm1=5&docID=news-000002701274>. It should be also be noted that similar delay tactics were used in the late 1990s to block President Clinton’s judicial nominations. See SCHERER, *supra* note 31, at 137–39.

45 This is the course of events that occurred with Peter Keisler; because Senator Leahy refused to take action on his nomination for almost two years, Keisler’s nomination was returned to the White House. See Specter, *supra* note 41; see also VACANCIES IN THE FEDERAL JUDICIARY—110TH CONGRESS: DEC. 1, 2008, *supra* note 35.

been over whether use of a filibuster is constitutional.⁴⁶ From one perspective, the SJC is responsible for vetting the nominees and recommending to the full Senate whether or not to confirm the nomination, and since the SJC chair is not violating any Senate or Committee rule, simply not acting on a nominee is an inherent part of the advice and consent process. Indeed, SJC obstruction usually occurs when the President selects a nominee without first getting “advice” (i.e., negotiating a bipartisan agreement or compromise) from strategic senators.⁴⁷ From this perspective, the text of the Constitution does not require that the Senate act on a nomination, but does require that the Senate give advice on a nominee.⁴⁸

From the opposite perspective, freezing the confirmation process is unconstitutional because “advice and consent” at the very least requires a vote to confirm or reject a nomination.⁴⁹ Indeed, allowing one senator to prevent a confirmation vote on a nominee seems to aggrandize the power of the Senate and ignore that the Constitution authorizes the *Senate*—not an individual senator—to give advice and consent.⁵⁰ Further, unlike the constitutional issues with filibuster obstruction, this method of obstruction is a direct by-product of a loophole in the Senate rules. That is to say, although now considered something of a senatorial norm and a standard part of the political confirmation process, the intentional lack of response to the question “will the Senate advise and consent to this nomination?” is not an op-

⁴⁶ This difference is most likely because using a filibuster to block a nominee is a publicized overt act, while SJC delay is inaction that remains out of the public spotlight.

⁴⁷ See SCHERER, *supra* note 31, at 137–47 (examining delay tactics used during the Clinton and Bush administrations); see also Denning, *supra* note 25, at 90. Denning states that the blue slip “has evolved as an effective mechanism for the enforcement of the norm that presidents are to seek the advice of senators before making judicial nominations.” *Id.* at 101.

⁴⁸ See White, *supra* note 14, at 147 (“Despite suggestions by the President, various Senators, and numerous commentators that the Senate has a constitutional obligation to act on judicial nominations, the text of the Constitution contains no such obligation.”).

⁴⁹ See Todd F. Gaziano, Dir., Ctr. for Legal and Judicial Studies, Statement before the House Judiciary Committee Subcommittee on the Constitution (Oct. 10, 2002). Gaziano argues that a full Senate vote on each nominee should be required “as a matter of prudence and in keeping with the comity that is required of each branch of government to the others, whether the Constitution or the Senate’s current rules requires such a vote or not.” *Id.* Further, a full Senate vote is even more constitutionally necessary when it is apparent that a majority of senators would confirm the nominee. *Id.*

⁵⁰ See Denning, *supra* note 25, at 88–90. In theory, the blue slip process allows the power to block a judicial nominee to shift from the SJC chair to any home state Senator. Denning argues that the blue slip process “dilutes the power of the executive,” and “diffuses responsibility and reduces transparency in the process.” *Id.* at 89.

tion that is provided for in the official Senate procedure.⁵¹ Additionally, some scholars argue that the Framers of the Constitution intended the Senate to have a narrow role in the Appointment Process, and it thus should not be able to block a nomination simply by refusing to take action.⁵²

In the *Federalist Papers*, Alexander Hamilton directly addressed the role of the Senate in the appointment process, stating that the Senate only had the power to “ratify” or “reject” the nominee:

It will be the office of the President to nominate, and, with the *advice and consent* of the Senate, to appoint. There will, of course, be *no exertion of choice on the part of the Senate*. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose—they *can only ratify or reject the choice he may have made*. They might even entertain a preference to some other person at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected.⁵³

From Hamilton’s statements, it is evident that he did not think the Senate had the power to do anything other than confirm or deny a nomination; in fact, he stated that they may have to confirm a nominee because there was no “positive ground of opposition to him.”⁵⁴ From this perspective, refusing to vote to confirm a nominee cannot be construed as rejecting a judicial nominee, because such a tactic is

⁵¹ See S. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, Rule XXXI (1), *supra* note 22. Part 6 of Rule XXXI states:

[N]ominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

Id. Although somewhat ambiguous on the issue, it is highly doubtful that this rule was meant to address nominations that were *intentionally* neither confirmed nor rejected. This rule is more likely meant to address failed *good faith* attempts for the SJC to provide a recommendation on a nominee because of the timing of the receipt of the nomination.

⁵² See Dr. John C. Eastman, Dir., Claremont Inst. Ctr. for Constitutional Jurisprudence, Statement before the House Judiciary Subcommittee on the Constitution (Oct. 10, 2002). Dr. Eastman argues that the Framers intended the President to have the “pre-eminent role” in appointing judges, and the Senate “would have a limited power to withhold confirmation as a check against political patronage.” *Id.*

⁵³ THE FEDERALIST NO. 66, at 403 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphases altered).

⁵⁴ *Id.*

designed specifically to prevent voting to confirm or reject the nominee.⁵⁵

The notion that preventing a SJC confirmation hearing and vote on a particular nominee is akin to “advise and consent” ignores that neither the Senate nor the SJC are actually voting “no” on a particular nominee after being sent the nomination. The Advice and Consent Clause can be broken down into two parts: “advice,” which applies before the President has officially nominated a person, and “consent,” which applies after the Senate has received the nomination. Once the President has selected the nominee, the Senate must decide whether or not to “consent” to that particular nominee. If the “Senate” (i.e., the SJC) does not believe it was allowed to give “advice” prior to a particular nomination, it should vote “no” on that nominee. By refusing to take action on a nominee the SJC is going beyond its constitutional “advise and consent” power. Indeed, the argument that refusing to give consent—distinct from voting no—is part of the “advise and consent” power fails because such “power” stems not from the Constitution or any official Senate rule, but from the SJC’s *exploitation of a loophole* in the Senate rules.

D. Flawed Solutions to the Confirmation Process

Ideally, the solution to the broken confirmation process would come from an internal bipartisan Senate agreement, such as the one proposed by Senator Arlen Specter in 2004 to establish deadlines for a SJC confirmation hearing and full Senate vote.⁵⁶ However, Senator Specter’s proposal was never adopted,⁵⁷ even though SJC Chair Leahy later agreed that there should be a sixty-day limit for nominations.⁵⁸ An internal solution of amending the Senate rules would fix the con-

⁵⁵ Indeed, obstructing a confirmation vote in the hope of bargaining to get a more favorable nominee seems to be exactly what Hamilton said was not possible, although it is unclear if the Framers foresaw the possibility of the Senate simply not voting, instead of outright rejecting a nominee. *See id.*

⁵⁶ *See* S. Res. 327, 108th Cong. (2004). Senator Specter’s proposed resolution would require that the SJC chair work with the ranking member to establish a timetable for confirmation hearings to be within thirty days after the nomination is submitted, and a full SJC action to occur within thirty days of the hearing. *See id.* § 1(a)(1). The full Senate would then have thirty days for action on the nomination. *See id.* § 1(a)(2). Under this proposal, thirty-day extensions would be allowed for investigating a nomination. *See id.* § 1(b). This solution would prevent delay and obstruction either by the SJC chair, or through the use of a filibuster.

⁵⁷ Senator Specter re-proposed this idea in his March 3rd, 2008 comments. *See* Specter, *supra* note 41.

⁵⁸ *Id.*

firmation problem without any other branch of government getting involved.

The main problem with any internal senatorial solution is that, in essence, the Senate would be taking away some of its own power; the Senate is the only body that, as a whole, benefits from the confirmation obstruction.⁵⁹ Amending the Senate Rules or the Senate Judiciary Committee Rules to insert time limits for judicial nominations could ultimately disarm the Senate's power to obstruct judicial nominations and reduce the Senate's overall leverage in the judicial appointments process.⁶⁰ Thus, while Senators understand and complain about the issues with the judicial confirmation process when nominees they support await confirmation, they have minimal motivation to solve the problem as a whole. Even at times when the Senate majority would be most likely to adopt time limitations for confirmation processes, they fear needing the power at a later time.⁶¹

The Senate's treatment of a moderate solution to confirmation problems proposed by President Bush in 2002 demonstrates the inherent unlikelihood of an internal Senate solution.⁶² President Bush's plan would have required the SJC to hold a hearing on a nominee within ninety days, and a full Senate confirmation vote within 180 days of receiving the nomination.⁶³ While not formally rejected, the President's proposal was looked at unfavorably in a Congressional Research Service report (CRS), and was otherwise ignored by the Senate.⁶⁴ The CRS report stated that Bush's plan to speed up the Senate confirmation process would severely limit a Senator's power to blue slip block, "a key institutional power of any Senator."⁶⁵ The report reveals the conflicts of interest preventing the Senate from voluntarily agreeing to any type of judicial confirmation solution, concluding that "streamlin[ing]" the judicial confirmation process "*could tip the balance of power on the selection of [judicial] nominees toward the President.*"⁶⁶

⁵⁹ See WITTES, *supra* note 11, at 112–13.

⁶⁰ *Id.* at 113–14.

⁶¹ In theory, the Senate would be most likely to adopt confirmation time limitations when the President and Senate majority were controlled by the same party. *Id.* at 114.

⁶² See President George W. Bush, Remarks by the President on Judicial Confirmations (Oct. 30, 2002) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021030-6.html>).

⁶³ *Id.*

⁶⁴ See BETSY PALMER, CRS REPORT FOR CONGRESS RS21506, IMPLICATIONS FOR THE SENATE OF PRESIDENT BUSH'S PROPOSAL ON JUDICIAL NOMINATIONS (2005).

⁶⁵ *Id.* at CRS-6.

⁶⁶ *Id.* (emphasis added).

Another way to fix the confirmation process would be for the Senate and President to work out a formal procedure for the President to get “advice” in exchange for quicker confirmation proceedings.⁶⁷ While this solution would be consistent with the Advice and Consent Clause, the reality is that the political feasibility of smooth collaboration between the President and the Senate is slight.⁶⁸

Despite repeated high-profile requests for a solution to the broken judicial confirmation process, no encouraging action has been taken towards a resolution.⁶⁹ Indeed, an analysis of the inherent problems with any internal solution demonstrates that the Senate is highly unlikely to act on its own to cede power to the Executive Office. Thus, another remedy to fix the broken process must be explored.

III. THE POSSIBLE SOLUTION TO THE OBSTRUCTION OF THE CONFIRMATION PROCESS: JUDICIAL ACTION

Using the judicial system as a potential mechanism to fix the judicial appointment process is not an entirely novel concept.⁷⁰ However, any legal action is fraught with both substantive and procedural issues, including standing, mootness, the Speech and Debate Clause, and, most importantly, the political question doctrine. Additionally, a federal judge—potentially biased from personal experience with the judicial nomination process—may be hesitant to get involved.

⁶⁷ See WITTES, *supra* note 11, at 115–16.

⁶⁸ See *id.* at 117–19. Even if a formal process for collaboration is created, this will not ensure that the two parties will be able to compromise with each other (this type of solution would be most necessary when different parties control the Executive Office and the Senate). Further, this solution requires the compromise of two branches of government; both the President and the Senate may view such a solution as a loss of future power.

⁶⁹ Other ideas for fixing the judicial confirmation process which have been discussed by legal scholars include adopting a constitutional amendment or passing a statute governing the confirmation process. See generally Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960 (2007); Ryan T. Becker, Comment, *The Other Nuclear Option: Adopting a Constitutional Amendment to Furnish a Lasting Solution to the Troubled Judicial Confirmation Process*, 111 PENN ST. L. REV. 981 (2007). However, many of the same partisan reasons that made an internal senatorial rule change unlikely are also applicable to such a solution, which would be dependent on legislative action. Another proposal to fix the overly partisan nature of the confirmation process is to create an impartial third party nominee review board. See Benjamin Wittes, *Judicial Nominations in an Umpireless Game: Trusted Sources, a Complaint, and a Proposal*, 93 MINN L. REV. 1487, 1500–01 (2009). This idea has merit and could remedy some of the partisan attacks on nominees, but does not directly address the main problem of SJC obstruction.

⁷⁰ See Renzin, *supra* note 12, at 1740; see also *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359 (D.C. Cir. 2005) (dismissing appellant’s suit challenging the constitutionality of the application of the Senate’s filibuster rules to judicial nominees).

Even with these potential obstacles, the most effective solution to the problems with the confirmation process may require the involvement of the judiciary. If the problems with the judicial confirmation process stem from an unconstitutional aggrandizing of power, the judiciary can, and should, be willing to get involved to prevent such abuse.

The following section will discuss potential litigation over SJC inaction on a judicial nominee, including the requisite cause of action, and procedural obstacles to any litigation.

A. *The Cause of Action*

In order for the judiciary to be involved in the Senate obstruction of the judicial confirmation, a party would need to bring a justiciable cause of action against the U.S. Senate. As an underlying premise, a proper plaintiff⁷¹ must argue that the Senate confirmation process for judicial nominees violates Article II, Section 2, Clause 2 of the Constitution, and the separation of powers doctrine.⁷² The separation of powers doctrine requires that the three branches of the federal government—executive, legislative, and judicial—balance each other out to ensure that none of the three branches oversteps its constitutional powers.⁷³ As has been previously discussed in depth, the Appointments Clause requires that Congress give “Advice and Consent” to the President regarding his nominations.⁷⁴ Thus, a plaintiff must demonstrate that the Senate has overstepped its constitutional power to give “advice and consent” by usurping some of the President’s appointment power.

At a minimum, the Senate’s inaction on judicial nominees raises a constitutional question with significant Separation of Powers concerns. A plaintiff would argue that the SJC’s obstruction of the confirmation process by the Committee chair intentionally failing to take action on a nominee is unconstitutional because it results in the full Senate never having the opportunity to vote whether to confirm or

⁷¹ See discussion on standing, *infra* Part III.B.1.

⁷² See *supra* Part I.C. Renzin discusses whether or not the Senate’s actions may also be unconstitutional by violating legislative due process, and the requirements of bicameralism and presentment. Renzin, *supra* note 12, at 1759–73. However, this Comment solely focuses on whether or not the confirmation process violates the Advice and Consent Clause and the separation of powers doctrine.

⁷³ See generally *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress cannot supervise executive agencies because only the Executive has the power to do so); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that a legislative veto altered legal rights of persons and thus acts as legislative action that is not passed by both the House and the Senate and then presented to the President, which violates the Constitution).

⁷⁴ See U.S. CONST. art. II, § 2, cl. 2.

reject the nomination.⁷⁵ Furthermore, while the SJC inaction may not be a direct violation of Senate Rule XXXI, it takes advantage of ambiguous language in the rule, and it does not follow the spirit of the Rule—to give an actual recommendation to the full Senate about whether or not to “advise and consent” to a nominee.⁷⁶ Indeed, even assuming arguendo that the obstructive behavior does not explicitly violate the Constitution, such tactics have not been authorized by the Senate, and thus can neither constitute a form of Senate “advice,”⁷⁷ nor be used as a strong-arm tactic to force the President to get advice for future nominees.⁷⁸

The Senate’s obstructionism affects both other branches directly: it deprives the President of his executive power to appoint, and it causes a “severe disruption to the judiciary.”⁷⁹ Moreover, because the Senate is directly infringing on the constitutional power of the Executive, who has the constitutional power to appoint nominees, the judicial branch must stop such behavior,⁸⁰ as it has previously done when one branch infringes on another branch.⁸¹

Bringing a cause of action against the Senate is fraught with potential obstacles, and the federal courts have rejected the few attempts to do so, mainly because of procedural problems. In *Judicial Watch, Inc. v. United States Senate*,⁸² the plaintiff Judicial Watch, a non-profit government accountability advocate (and a very active litigant), sued the Senate for the use of filibusters to block judicial confirmation votes.⁸³ Judicial Watch claimed that because the advocacy group filed hundreds of lawsuits in federal court, the Senate’s actions to slow the confirmation process injured Judicial Watch “by increasing delay in its lawsuits and adversely affecting its interest in ‘the efficient and proper function of the federal court system.’”⁸⁴ However, the Court of Appeals for the District of Columbia affirmed the District

75 Filibuster obstruction techniques are a slightly different situation since this raises questions regarding whether a supermajority is required to confirm a nominee. See generally Cornyn, *supra* note 5.

76 See S. COMM. ON RULES & ADMIN., *supra* note 22 and accompanying text.

77 See *id.*

78 See discussion *supra* note 26.

79 Renzin, *supra* note 12, at 1757.

80 *Id.* at 1758.

81 See *supra* note 73 and accompanying text.

82 432 F.3d 359 (D.C. Cir. 2005).

83 *Id.* at 359–61.

84 *Id.* at 360.

Court's dismissal of the case for lack of standing,⁸⁵ holding that Judicial Watch "failed to substantiate either essential link—between [Senate] Rule XXII and delayed vacancy filling, and between delayed vacancy filling and delayed adjudication."⁸⁶ Thus, the Court of Appeals found that the plaintiff lacked standing because it failed the requisite causation element.⁸⁷

More recently, in *Cogswell v. United States Senate*,⁸⁸ the District Court in Colorado dismissed⁸⁹ a lawsuit brought by a citizen against the U.S. Senate in which the plaintiff argued that the "unreasonable" time taken by the U.S. Senate in filling the open district court seats in Colorado violate[d] his 'constitutional right to meaningful access to this Court.'⁹⁰ The magistrate's dismissal recommendation found that the complaint failed for three reasons: (1) it lacked proper subject matter jurisdiction,⁹¹ (2) it lacked standing,⁹² and (3) the lawsuit was precluded by the political question doctrine.⁹³

These attempts to litigate the Senate confirmation process ultimately failed because the plaintiffs could not overcome the procedural obstacles associated with such a unique lawsuit. While both lawsuits are examples of the type of litigation which could resolve the confirmation process mess, both plaintiffs had weak arguments that they fulfilled standing requirements since neither was directly affected by the judicial appointment obstruction.

85 The case was originally dismissed by the District Court for lack of standing. *Judicial Watch, Inc. v. United States Senate*, 340 F. Supp. 2d 26, 38 (D.D.C. 2004). The Court of Appeals affirmed this decision. *Judicial Watch*, 432 F.3d at 360.

86 *Judicial Watch*, 432 F.3d at 362.

87 *Id.*; see discussion *infra* Part III.B.1.

88 No. 08-cv-01929-REB-MEH, 2009 WL 529243 (D. Colo. Mar. 2, 2009).

89 The District Court adopted the recommendation of the U.S. magistrate judge, overruling the plaintiff's objections to the recommendations. *See id.* at *1.

90 *Id.* at *2. The plaintiff requested that the court issue an injunction preventing U.S. Senators from receiving their salaries. *Id.*

91 The magistrate found that the plaintiff's *Bivens* claim was "deficient" for a number of reasons, including plaintiff's request for injunctive relief since *Bivens* claims only provide for damages remedies. *See id.* at *3–*4.

92 The magistrate found that the plaintiff failed to establish an "injury in fact" necessary for standing. *Id.* at *5. The magistrate rejected the plaintiff's asserted injury, which involved ongoing inaction by a district court pertaining to a motion for attorney's fees made by the plaintiff in 2006 (in a separate matter). *Id.* The Magistrate noted that it was unsure why the matter was never resolved, but that none of the parties had filed a motion for order or for clarification. *Id.*

93 *Id.* at *7–*8. The issues raised by the magistrate regarding the political question doctrine are addressed *infra* note 109 and accompanying text.

B. Potential Procedural Concerns

This Section will address the obstacles which could prevent a litigant from successful litigation against the Senate. While the first two obstacles, standing and mootness, are fairly straight-forward, the third, the political question doctrine, presents a complex problem which a court could decide precludes judiciary involvement.

1. Standing

In order for a plaintiff to bring a cause of action against the Senate,⁹⁴ she must show that she has constitutional standing.⁹⁵ To show standing, a plaintiff must show (1) an “injury in fact,” (2) causation, and (3) redressability.⁹⁶ The redressability requirement may pose the biggest obstacle for a potential plaintiff.⁹⁷

The injury in fact and causation requirements greatly limit the potential plaintiffs who could litigate SJC inaction. To satisfy the injury in fact requirement, a plaintiff must have “suffered” an “invasion of a legally protected interest which is (1) concrete and particularized, and (2) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’”⁹⁸ Meanwhile, to meet the causation requirement, the “the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”⁹⁹ As *Judicial Watch* and *Cogswell* demonstrated, both the injury in fact and causation requirements are difficult for citizens or interest groups to satisfy because courts will not infer a connection between delays in confirmations and delays in adjudication, finding any connection too speculative.¹⁰⁰

⁹⁴ The Speech or Debate Clause would preclude bringing a cause of action directly against an individual senator, such as the chair of the SJC. See Renzin, *supra* note 12, at 1777–79.

⁹⁵ See *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 360 (D.C. Cir. 2005).

⁹⁶ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (holding that plaintiff environmental group did not have standing because it did not assert sufficient injury and claimed injury was not redressable).

⁹⁷ The redressability requirement for standing overlaps with some of the concerns of the political question doctrine, and will be addressed in that Section, *infra* Part III.B.3.

⁹⁸ See *Lujan*, 504 U.S. at 560 (citations omitted).

⁹⁹ *Id.* (alterations in original).

¹⁰⁰ See *Judicial Watch*, 432 F.3d at 362; *Cogswell v. U.S. Senate*, No. 08-cv-01929-REB-MEH, 2009 WL 529243, *5–*6 (D. Colo. Mar. 2, 2009). *Judicial Watch* indicates that it would be exceedingly difficult for *any* litigant to rely on a “causation” argument based on the slow-down or workload of the judicial system. See 432 F.3d at 362. Thus, it is highly doubtful that a federal judge “unable to carry out his or her responsibilities adequately because of an excessive workload” would satisfy the injury in fact requirement. Renzin, *supra* note 12, at 1775; see also *id.* at 1775 n.180.

Given the decisions in *Judicial Watch* and *Cogswell*, it is likely that the only potential plaintiffs who may fulfill the injury in fact and causation criteria for standing are people more directly connected with the appointment process. Thus, there are three categories of potential plaintiffs: a senator,¹⁰¹ the President,¹⁰² or a judicial nominee whose confirmation vote has been obstructed.¹⁰³ Assuming the underlying SJC inaction on a judicial nominee, all three types of plaintiffs would meet the injury in fact and causation requirements because each would have suffered an invasion of a legally protected interest directly caused by the SJC inaction. Nevertheless, there are enormous potential political and publicity ramifications to a lawsuit.¹⁰⁴ Overall, given the limited plaintiffs potentially capable of satisfying the standing requirements, an action against the Senate's obstruction of the confirmation process would require very specific circumstances and would likely need to be partially politically motivated.

2. Mootness

One potentially fatal aspect to an action against Senate obstruction is that at some point during the lawsuit, the issue may be rendered moot, either by the nominee withdrawing from consideration, the nominee being confirmed by the Senate, or the Senate term coming to a close.¹⁰⁵ However, the Supreme Court has held that "volun-

¹⁰¹ A senator, whether or not a member of the SJC, could potentially bring an action against the entire Senate for allowing the SJC chair to deny him his constitutional right to vote to confirm (or deny) a judicial nomination. For further discussion, see Renzin, *supra* note 12, at 1775 n.179.

¹⁰² The President could potentially bring an action against the Senate for infringing on his constitutional appointment power.

¹⁰³ A nominee whose Senate confirmation was blocked could claim that she was denied the opportunity for a full Senate vote to be either confirmed or denied a federal judge, as is required by the Constitution. To some extent, such a scenario would be similar to the situation in *Marbury v. Madison*, in which William Marbury was nominated and confirmed as justice of the peace but his signed commission was withheld. 5 U.S. (1 Cranch) 137 (1803). The Supreme Court famously found that Marbury had a vested legal right to his appointment, but that the Court did not have original jurisdiction to issue a writ of mandamus. *Id.*

¹⁰⁴ Perhaps the most difficult obstacle to any such lawsuit is the potential political consequences for the plaintiff. The negative political ramifications for any of the potential plaintiffs to bring such a lawsuit may greatly outweigh the overall individual benefit of such a lawsuit. Conversely, the political aspects may also be an underlying motivation for such a lawsuit.

¹⁰⁵ This occurred in *Judicial Watch*, when one of the nominees being filibustered, Miguel Estrada, withdrew himself from consideration, and the other, Priscilla Owen, was confirmed during the course of the lawsuit. 432 F.3d at 361.

tary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.”¹⁰⁶ To determine whether the court should prevent the defendant from engaging in the challenged behavior in the future, the court must examine if “subsequent events made it absolutely clear that allegedly wrongful behavior could not reasonably be expected to recur.”¹⁰⁷

Thus, it is most likely that, unless the Senate ensured such obstruction would not occur again by amending its rules to fix potential confirmation obstruction by the SJC,¹⁰⁸ the issue would not be rendered moot by a change in the nomination status for an individual nominee.

3. *Political Question Doctrine*

The political question doctrine is the biggest impediment to a proper plaintiff bringing a legal action against the Senate’s obstruction of the confirmation process. Although at first glance the doctrine seems to apply to this type of litigation,¹⁰⁹ upon closer analysis the doctrine does not actually preclude judicial involvement.

¹⁰⁶ *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In *City of Mesquite*, Aladdin's Castle sought an injunction against the enforcement of a city ordinance which governed the operation and licensing of coin-operated amusement establishments. *Id.* at 288. The district court's ruling that the ordinance was unconstitutionally vague was affirmed by the court of appeals. *Id.* at 286–88. While the case was pending at the court of appeals, the city amended the ordinance to remove the language which had been found constitutionally vague. *Id.* at 288. The Supreme Court held that amending the ordinance did not render the case moot, and that without a further injunction, nothing prevented the city from “reenacting precisely the same provision if the district court's judgment were vacated.” *Id.* at 289.

¹⁰⁷ *Id.* at 289 n.10 (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203–04 (1968)).

¹⁰⁸ The Senate amending its rules to prevent SJC inaction on a nominee would make the litigation successful, since a change to the Senate rules was the goal of the lawsuit. In fact, one of the tangential benefits of a lawsuit would be the increased pressure on the Senate to fix the problems with the SJC confirmation process. As previously discussed, this type of internal solution is preferable to a judicial resolution.

¹⁰⁹ Indeed, the magistrate judge in *Cogswell* found that the political question doctrine precluded the court from adjudicating the issues surrounding the obstruction of the judicial confirmation process. See *Cogswell v. U.S. Senate*, No. 08-cv-01929-REB-MEH, 2009 WL 529243, at *7–*8, *10–*11 (D. Colo. Mar. 2, 2009). However, the magistrate determined the political question doctrine applied based on the plaintiff's specific amended requests for relief. In his amended complaint, the plaintiff requested the court declare that the “U.S. Senate has no advice on the appointment and consents to the appointment,” and asked the court to “assign a four-month time frame in which the U.S. Senate must advise and consent on the President's nominated judges.” *Id.* at *8. The political question doctrine would preclude the court from making such a declaration, as the judiciary would be making policy, interfering with internal Senate procedures, and participating in the appointment process if it determined a specific time limit for confirmation hearings or

In essence, the political question doctrine, itself a product of the separation of powers, makes sure the judiciary does not infringe on the other branches by deciding policy issues which the Constitution assigns to another branch.¹¹⁰ Although a judge may decide to exercise judicial restraint given potential conflicts of interest stemming from the judicial branch's interest in the outcome, and because every federal judge could harbor bias based on personal interaction with the judicial confirmation process, a judge is not precluded from hearing a case on this issue under the political question doctrine.¹¹¹

In *Baker v. Carr*,¹¹² the seminal case discussing the political question doctrine, plaintiffs brought a Fourteenth Amendment equal protection lawsuit challenging a Tennessee statute from 1901 which they claimed “debase[ed] their votes” because of its apportionment of legislative representation within the state.¹¹³ Addressing the issue of justiciability, the Supreme Court identified six factors to determine if an issue is a nonjusticiable political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹¹⁴

Ultimately, the Court held that voter apportionment was justiciable by the federal court and not a political question.¹¹⁵

The Supreme Court dealt with the political question doctrine most recently in *Nixon v. United States*.¹¹⁶ In *Nixon*, a former federal judge, who had been impeached and removed from office, sued the Senate.¹¹⁷ Nixon claimed that the Senate's impeachment process,

ruled that the lack of action constituted confirmation of a nominee. Although the magistrate's analysis is correct based on the defective request for relief, had the plaintiff asked for a less specific declaratory judgment that did not force the court to make policy, the political question doctrine would not have applied.

¹¹⁰ See Renzin, *supra* note 12, at 1780 n.207 (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

¹¹¹ Renzin notes that the political question doctrine provides an “easy way” to avoid having to actually decide the merits of the case. See Renzin, *supra* note 12, at 1780.

¹¹² 369 U.S. 186 (1962).

¹¹³ *Id.* at 187–88.

¹¹⁴ *Id.* at 217.

¹¹⁵ *Id.* at 237.

¹¹⁶ 506 U.S. 224 (1993).

¹¹⁷ *Id.* at 226–28.

which involved an evidentiary hearing before the Senate impeachment committee, violated the Constitution's impeachment requirements because, while the Constitution gave "sole" power to the Senate to "try" an impeachment, the whole Senate did not in fact "try" him.¹¹⁸ The Supreme Court ruled that it would not get involved in the Senate's decision of how to hold impeachment trials.¹¹⁹ The Court found that this issue was governed by the political question doctrine because (1) the imprecise meaning of the word "try" did not allow the court "any judicially manageable standard of review," and also did not preclude the Senate from using a committee as long as a two-thirds vote was used to convict,¹²⁰ (2) the Constitution specifically intended that the judiciary would not have a role in the impeachment process as demonstrated by the use of "sole," and impeachment was designed to be the only check on the judiciary branch,¹²¹ and (3) adjudicating the case would "open[] the door of judicial review to the procedures used by the Senate in trying impeachments," causing political "chaos."¹²² Additionally, if the judiciary were to interfere with the impeachment process, there would be a lack of finality and a question of what relief it could grant.¹²³

The Court's holding in *Nixon* illustrates why the political question doctrine would not preclude a lawsuit over the SJC's obstruction of the appointment process.¹²⁴ A comparison of the situation in *Nixon* with the issue at bar demonstrates why the impeachment process at issue in *Nixon* is a nonjusticiable political question but distinguishable from the situation at issue here.¹²⁵ First, unlike the impeachment procedures at issue in *Nixon*, which were delegated solely to the Legislature, the appointment power is primarily rooted in the executive branch, with the Senate giving "advice and consent."¹²⁶ Because the appointments process involves two branches of government, the judi-

118 *Id.*

119 *Id.* at 237–38.

120 *Id.* at 229–30.

121 *Id.* at 231–35.

122 *Id.* at 236.

123 *Id.*

124 As has been previously discussed, the use of a filibuster as a mechanism of obstructing a confirmation vote, thereby requiring a supermajority confirmation vote, raises separate issues. See *supra* note 75 and accompanying text.

125 See Renzin, *supra* note 12, at 1782–83 (describing factors that distinguish the situation in *Nixon* from the situation in which the Senate does not carry out its "advice and consent" functions).

126 The Appointments Clause is found in Article II of the Constitution, which enumerates the executive powers; Article I pertains to the legislative powers. See EPSTEIN & SEGAL, *supra* note 18, at 18.

ciary may be required to prevent the overstepping of constitutional power by one branch.¹²⁷ Second, the appointment process impacts the judiciary indirectly, prior to a judge taking the bench; the process was not meant to be a *check* on the judiciary, unlike the impeachment process.¹²⁸ Third, although “advice and consent” is arguably ambiguous and seems to “lack[] sufficient precision to afford any judicially manageable standard of review,”¹²⁹ unlike the relationship between the Senate’s impeachment procedure and the word “try,” the Senate is neither giving “advice”¹³⁰ nor “consent”¹³¹ by refusing to take action on judicial nominees.¹³² Indeed, although the precise meaning of “advise and consent” may be a policy issue to be determined by the Legislature (and the Executive), the Judiciary must prevent the Senate from unconstitutionally expanding this meaning.¹³³ In fact, there is direct¹³⁴ and indirect¹³⁵ evidence that the SJC is *intentionally* avoiding its Constitutional obligation to confirm or reject a nominee, which would make the timeliness issue “judicially discoverable and manageable,”¹³⁶ without the Court needing to determine how long of a delay makes the SJC inaction unconstitutional.

Moreover, unlike the impeachment process at issue in *Nixon*, confirmation obstruction is *not* a procedure specifically allowed for in the Senate Rules, which call for a final question for every nominee—if the Senate will “advise and consent to this nomination.”¹³⁷ Thus, a

¹²⁷ See *INS v. Chadha*, 462 U.S. 919 (1983); see also Renzin, *supra* note 12, at 1783–84 (noting that courts have allowed judicial intervention to enforce a minimal amount of fair procedure by the Senate).

¹²⁸ See Renzin, *supra* note 12, at 1782.

¹²⁹ *Nixon v. United States*, 506 U.S. 224, 230 (1993).

¹³⁰ “Advice” is defined as a “recommendation regarding a decision or course of conduct.” MERRIAM-WEBSTER ONLINE DICTIONARY (2009), <http://www.merriam-webster.com/dictionary/advice> (last visited Feb. 16, 2010).

¹³¹ “Consent” is defined as “to give assent or approval.” MERRIAM-WEBSTER ONLINE DICTIONARY (2009), <http://www.merriam-webster.com/dictionary/consent> (last visited Feb. 16, 2010). Neither is the Senate refusing to give consent by rejecting the nominee.

¹³² In fact, the Senate is taking no action at all and is thus *ignoring* the Constitution. See *supra* note 49 and accompanying text.

¹³³ See *Nixon*, 506 U.S. at 252–53 (Souter, J., concurring), see also *infra* note 150 and accompanying text.

¹³⁴ There are many news articles and press releases with quotations from Senators discussing the intentional SJC inaction. See, e.g., Leahy, *supra* note 6 (“As a result, this nomination, which was opposed by home state Senators from the start, was one that could not move [to a hearing].”).

¹³⁵ An example of indirect evidence is the SJC scheduling hearings on certain judicial nominees even while nominees who have been pending for years are not scheduled.

¹³⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹³⁷ See S. COMM. ON RULES & ADMIN., *supra* note 22 and accompanying text. The Senate Rules instruct that, ultimately, the Senate must vote whether or not to confirm a nomi-

key distinction between judicial involvement with the impeachment process at issue in *Nixon* and the confirmation obstruction at issue here is that the judiciary would not be reviewing a sanctioned internal procedure of the Senate; instead, it would be preventing manipulation and avoidance of those internal procedures.¹³⁸

The feasibility of a judicial remedy or relief does pose an issue for a litigant, but this problem is far less significant than it was in *Nixon*.¹³⁹ While in *Nixon* there were substantial concerns over “lack of finality” and the Court’s potential reinstatement of a convicted federal judge,¹⁴⁰ relief for the SJC inaction on judicial confirmation could be limited to ensuring a Senate confirmation vote on the nominee at issue and declaring such inaction unconstitutional.¹⁴¹ Further, a court might be able to declare the Senate Judiciary Committee Rules unconstitutional, and instruct that the rule be modified.¹⁴² The Court has previously declared the Senate’s actions unconstitutional.¹⁴³ Although a judicial remedy would be difficult to enforce and may increase the tension between the three branches of government, almost any separation of powers remedy faces similar hurdles.

The separate concurring opinions of Justice White and Justice Souter in *Nixon* further illustrate why the Senate inaction on judicial confirmation is a justiciable issue and not precluded by the political

nee. *See id.* Therefore, the root of this problem stems from the Senate Judiciary Rule allowing only the chair to schedule committee action, with no time limit for acting on a nomination. *See supra* note 24 and accompanying text. The Senate could enact rules giving the committee power to not take action on a nominee they do not approve of, although such a rule may ultimately also violate the Constitution. However, in this situation, unlike the use of the filibuster, obstruction by refusing to take action has no basis from a formal Senate Rule.

138 *See Nixon*, 506 U.S. at 236 (explaining the problems with judicial review of the impeachment process). The obstruction by the SJC through the use of the blue slip policy is discussed *supra* notes 25–26 and accompanying text.

139 *See Nixon*, 506 U.S. at 236 (noting that possible remedies to the case might be the reinstatement of the convicted federal judge or the creation of a judgeship if the position had been filled).

140 *Id.*

141 The relief requested is important in avoiding preclusion under the political question doctrine. The type of relief requested by the plaintiff in *Cogswell*, where the court was asked to “confirm” the nominee or determine a specific time limit for confirmation, would render the action a political question. *See Cogswell v. U.S. Senate*, No. 08-cv-01929-REB-MEH, 2009 WL 529243, at *8 (D. Colo. Mar. 2, 2009), discussed *supra* note 109.

142 This remedy could include mandating the insertion of some sort of time limit to act on nominations. However, because such a specific mandate may be an interference with internal Senate procedures, a court could just insist that the Senate amend its rules to ensure compliance with the Advice and Consent Clause of the Constitution. A court could avoid inserting its own “policy” into the remedy by simply forcing the Senate to take action.

143 *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983).

question doctrine.¹⁴⁴ Justice White concurred with the majority because the “Senate fulfilled its constitutional obligation to ‘try’ [the] petitioner,” but he did not believe that the issue was precluded by the political question doctrine.¹⁴⁵ Justice White noted that the political question doctrine is applicable when “the Constitution has given one of the political branches *final* responsibility for interpreting the scope and nature of [governmental] power,” not when the Constitution merely gives “*exclusive* responsibility for a particular governmental function to one of the political branches.”¹⁴⁶ Justice White further pointed out that the Court has no problem interfering with the legislative branch’s legislative powers when the Court believes a legislative act contravenes the Constitution.¹⁴⁷ Applying Justice White’s opinion to the issue of judicial confirmation obstruction demonstrates why it is not a political question. The Senate must provide “advice and consent” to the President; the Senate does not have “final responsibility” or even “exclusive responsibility” over the appointment process, which makes it impossible to have unilateral power to interpret “advice and consent.”¹⁴⁸ The judiciary has the ability to review the Senate’s action (or inaction) and should prevent the Senate from disregarding the text of the Constitution, especially since the Senate has not even formally “interpreted” its power to advise and consent in the manner being conducted by the SJC.¹⁴⁹

Meanwhile, Justice Souter agreed with the *Nixon* majority opinion that the impeachment issue was a nonjusticiable political question, but he noted that there are limitations to the application of the political question doctrine: “Not all [judicial] interference is inappropriate or disrespectful . . . and application of the doctrine ultimately turns . . . on ‘how importunately the occasion demands an answer.’”¹⁵⁰ Justice Souter stated that if the Senate had been holding impeachment proceedings “in a manner [that] seriously threaten[ed] the integrity of its results . . . judicial interference might well be appropri-

144 See *Nixon*, 506 U.S. at 239–52 (White, J., concurring); *id.* at 252–54 (Souter, J., concurring).

145 *Id.* at 239 (White, J., concurring).

146 *Id.* at 240 (emphases added).

147 See *id.* at 242.

148 Although the Senate has the power to interpret “advice and consent,” it is constrained since the Constitution does not provide it with “sole” power to do so, as it did with impeachment in *Nixon*. See *id.* at 230–31 (majority opinion). For example, there would be no doubt that if the Senate interpreted “advice and consent” to mean that it would *only* confirm judicial nominees whom the SJC chair told the President to nominate (the “advice”), the Senate would be aggrandizing its constitutional power.

149 See *id.*

150 *Id.* at 253 (Souter, J., concurring) (citation omitted).

ate.”¹⁵¹ Justice Souter’s concurrence is directly applicable to the Senate’s judicial appointment obstruction because the Senate *is* acting “in a manner [that] seriously threaten[s] the integrity” of the judicial appointment process.¹⁵² Instead of making a good faith effort to give “advice and consent,” the Senate (through the SJC’s inaction) ignores the President’s nomination; the Senate is neither consenting to nor rejecting a nominee without giving any reason for the obstruction. The Senate’s actions in this situation are akin to Justice Souter’s example of the Senate convicting based on a “determination that an officer of the United States was simply ‘a bad guy.’”¹⁵³ The Senate’s inaction is “beyond the scope of its constitutional authority,” which “merit[s] a judicial response despite the prudential concerns that would ordinarily counsel silence.”¹⁵⁴

The Senate would vehemently oppose the plaintiff’s arguments on the political question doctrine. The counterarguments from the Senate could focus on the Court’s interference with internal procedure of the Senate. Furthermore, the Senate has the ability to determine how it interprets “advice and consent” just as it had in *Nixon* to interpret “try” and could argue that its inaction on a nominee constitutes either its advice (being ignored) or its (lack of) consent.¹⁵⁵ Additionally, the Senate can argue that the text of the Constitution does not actually require a vote whether to consent to a nominee, and, therefore, the judiciary should not get involved when the Senate is not acting unconstitutionally.¹⁵⁶

Despite Senate arguments against judicial action, the political question doctrine would not preclude a lawsuit. The judiciary has the power to review the unconstitutional actions of the other branches of government. As the Court in *Nixon* stated, “courts possess power to review either legislative or executive action that transgresses [the] identifiable textual limits [of the Constitution].”¹⁵⁷ Here, the SJC’s lack of action constitutes such a transgression, and the judiciary has the “responsibility . . . as ultimate interpreter of the Constitution,”¹⁵⁸ to determine if such behavior is constitutional.

151 *Id.* at 253–54.

152 *Id.*

153 *Id.* (citing Justice White’s concurring opinion at 239).

154 *Id.* at 254.

155 *See* Renzin, *supra* note 12, at 1783–84.

156 *See* White, *supra* note 14, at 147–48 (asserting that the text of the Constitution does not obligate the Senate to act on judicial nominations).

157 *Nixon*, 506 U.S. at 238.

158 *Id.*

IV. CONCLUSION

There is no doubt that the Senate judicial confirmation process for district and circuit court judges has serious flaws that are becoming increasingly problematic and partisan. The long delays and partisan bickering have lead to a slowdown in the federal court system as fewer judges to hear cases means longer delays for litigants. Moreover, because the most highly qualified candidates for nomination face the most contentious opposition and prolonged delays, the overall quality of the judiciary suffers when potential nominees decline or are forced to withdraw their nomination.

Because the Senate has not taken any action to fix the problem created when the chair of the SJC refuses to take action on a nominee, other solutions must be explored. Litigation, although fraught with internal and external obstacles and requiring a very specific set of circumstances with the correct plaintiff, is the most effective solution to produce a meaningful change to the confirmation process. A judicial resolution remains the only direct mechanism for compelling the Senate to end its unconstitutional practice of obstructing the confirmation process and fix the broken confirmation process.

Even a failed lawsuit could indirectly fix the confirmation process by increasing the public awareness about the issue. If a court deemed a lawsuit against the Senate to be precluded under the political question doctrine, which this Comment argues would be erroneous, the potential media attention from a high-profile lawsuit could itself bring about reform. Increased media scrutiny could bring the current broken process into the public spotlight, pressuring the Senate to fix the problem by amending its rules. Just as media attention prevents extreme delay tactics for Supreme Court Justice confirmation hearings, the media exposing this flaw in the confirmation process may prevent future delays for the confirmation process of lower federal court judges.